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SERVICE DATE – FEBRUARY 22, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 259X)

TENNESSEE RAILWAY COMPANY–ABANDONMENT EXEMPTION–
IN ANDERSON AND CAMPBELL COUNTIES, TN

Decided: February 18, 2005

Tennessee Railway Company (TNR), a wholly owned subsidiary of Norfolk Southern Railway Company (NS), filed a notice of exemption under 49 CFR 1152 Subpart F-Exempt Abandonments and Discontinuances of Service and Trackage Rights to abandon a 14.04-mile line of railroad between milepost TE-27.96 at Nick's Creek and milepost TE-42.00 at Devonia, in Anderson and Campbell Counties, TN. Notice of the exemption was served and published in the Federal Register on January 19, 2005 (70 FR 3103). The notice stated that the exemption would become effective on February 18, 2005, unless stayed by the Board or a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2) was filed by January 31, 2005. On January 31, 2005, the National Coal Corporation (NCC) filed a formal expression of intent to file an OFA. NCC included with its notice of intent a financial statement and several press releases noting the company's recent acquisitions. The notice of intent to file an OFA automatically stayed the effective date of the exemption until February 28, 2005.

By a pleading filed on February 1, 2005, NCC requests that NS, on behalf of TNR, provide the potential offeror with the information prescribed in 49 CFR 1152.27(a), including: (1) the minimum purchase price required to acquire the line; (2) NS's most recent assessment of the line's physical condition; (3) revenue and other data necessary to determine the carrier's estimate of net liquidation value; (4) supporting data reflecting real estate appraisal, assessments of the quality and the quantity of track material in the line and removal cost estimates used to obtain the net liquidation value; and (5) an estimate of the cost to rehabilitate the line to Federal Railroad Administration Class 1 safety standards. NCC believes that it will not receive the data prior to the 30-day deadline by which it must file an OFA.¹ Therefore, NCC requests that the 30-day time period for filing an OFA be tolled. NCC asks that the OFA be due 30 days after the carrier provides the requested information, a period which it believes necessary to review and analyze the data.

TNR submitted a reply by facsimile on February 15, 2005. TNR generally argues that the Board should not require the carrier to provide any of the requested information and should

¹ Under 49 CFR 1152.27(c)(2)(ii)(B), OFAs are due 30 days after publication of the notice of exemption in the Federal Register.

reject NCC's notice of intent to file an OFA because the financial information NCC submitted with its notice demonstrates that the potential offeror cannot fund the acquisition and continued operation of the line. TNR argues that, even if the Board accepts NCC's notice of intent and requires that the requested information be produced, TNR should not be required to produce information regarding repair and rehabilitation costs because these data are not relevant to calculating net liquidation value and NCC apparently does not contemplate filing an OFA to subsidize continued service. Furthermore, TNR requests that, if the Board accepts NCC's notice of intent and information request, it be permitted 60 days to provide the requested information. TNR claims that it needs additional time because it will need to have a land appraisal conducted to help determine the line's net liquidation value.

NCC filed a response on February 18, 2005. NCC confirms that its OFA will be for the purchase of the line, agrees to withdraw its request for information regarding repair and rehabilitation costs as long as TNR agrees to allow NCC access to the line to conduct an independent appraisal, and responds to TNR's contention that NCC is not able financially to acquire and operate the line.

TNR will be required to provide all the requested information except for data concerning the cost of rehabilitating the line and will be required to allow NCC access to the line to conduct its own appraisal. TNR's concerns that NCC is not financially responsible are premature. The Board determines if an entity offering assistance is financially responsible after that entity files the actual offer.² Furthermore, the financial statement and press releases of NCC indicate that the corporation generated significantly more revenue in 2004 than 2003, has assets worth millions of dollars, and has access to a significant amount of credit. And in its February 18 filing, NCC has provided updated financial information further supporting its ability to purchase and operate the line.

TNR does not need to provide data concerning the cost of rehabilitating the line. Under 49 CFR 1152.27(a)(3), a carrier must provide these data only if the potential offeror is contemplating an offer to subsidize continued rail service, something that is not happening here. NCC, however, has requested access to the line to conduct an appraisal. That request is reasonable and will be granted.

TNR has advised the Board pursuant to 49 CFR 1152.27(c)(2)(ii)(D) that it needs an additional 60 days to prepare the necessary information for NCC. Accordingly, TNR will have 60 days from the service date of this decision to prepare and submit the requested data and to notify the Board that it has done so. When TNR gives NCC the data necessary to formulate its OFA, NCC will have 30 days to submit an OFA. This period will give NCC a reasonable period of time to review the data and make its offer. Moreover, TNR has not objected to the length of

² See 49 CFR 1152.27(e)(2).

time requested by NCC. The effective date of the exemption will be postponed until 10 days after an OFA is due.³

The Board's Section of Environmental Analysis (SEA) served an environmental assessment in this proceeding on January 24, 2005, preliminarily concluding that, as currently proposed, abandonment of the line will not significantly affect the quality of the human environment. SEA requested comments by February 8, 2005.

The United States Fish and Wildlife Service (USFWS) has submitted a comment. In the comment, USFWS expresses concern about erosion and suggests that, if any bridges are removed, TNR should: (1) utilize silt barriers when working adjacent to all streams to prevent runoff of sediment; (2) reshape streambanks to the original contour; and (3) reseed with native vegetation that is beneficial to wildlife immediately following the completion of bridge removal. SEA recommends that, if any bridges will be removed as part of the proposed abandonment, TNR should consult with USFWS (Wally Brines at (931)-528-6481, ext. 222) regarding that agency's recommendations prior to the commencement of any salvage operations.

The environmental condition recommended by SEA will be imposed. As conditioned, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the exemption of the abandonment of the rail line described above is subject to the condition that, if any bridges will be removed as part of the proposed abandonment, then, prior to the commencement of any salvage operations, TNR shall consult with USFWS (Wally Brines at (931)-528-6481, ext. 222) regarding its recommendations for using silt barriers when working adjacent to all streams to prevent runoff of sediments; reshaping streambanks to the original contour; and reseeding with native vegetation that is beneficial to wildlife.
3. TNR is directed to provide NCC with the requested information to the extent described above by April 25, 2005, and to notify the Board in writing that it has done so, and to allow NCC access to the line to conduct an appraisal. The deadline for NCC to file its OFA is tolled until 30 days following the date that TNR provides NCC with this information.

³ Because these extensions are not date specific, TNR will, as previously noted, be directed to notify the Board when it has furnished the requested information to NCC so that the due date for filing an OFA and the effective date of the exemption can be determined for the record.

4. The effective date of the exemption is postponed until 10 days after the due date for NCC's filing of its OFA.

5. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary